IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BELL ATLANTIC CORPORATION	:	**CIVIL ACTION**
v.	:	
UNITED STATES OF AMERICA	:	**No. 96-8657**

MEMORANDUM AND ORDER

BECHTLE, J. DECEMBER 3, 1998

Presently before the court is a refund action under 28 U.S.C. § 1346(a)(1) brought by Bell Atlantic Corporation ("Bell Atlantic")[1] against the United States of America for a refund in the amount of $77,476,303.00 plus interest that it believes it is entitled to under the transitional rules governing the phase-out of the Investment Tax Credit ("ITC") for tax year 1986. (Bell Atlantic Exhibit ("BA Ex.") 414.)[2] A bench trial before this court commenced on March 17, 1998 and finished on March 19, 1998.

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[1] "Bell Atlantic" as used herein refers individually or collectively, to Bell Atlantic Corporation and its affiliates, including its seven telephone company subsidiaries: The New Jersey Bell Telephone Company ("NJB"); The Bell Telephone Company of Pennsylvania ("Bell-Pa"); The Chesapeake and Potomac Telephone Company (District of Columbia) ("C&P-D.C."); The Chesapeake and Potomac Telephone Company of Maryland ("C&P-Md"); The Chesapeake and Potomac Telephone Company of Virginia ("C&P-Va"); The Chesapeake and Potomac Telephone Company of West Virginia ("C&P-WVa"); The Diamond State Telephone Company (Delaware) ("DST") (Stip. Def. A.) In 1997, NYNEX, the local access carrier for New York and New England, merged with Bell Atlantic. NYNEX and its affiliates are not a party to this action.

[2] Bell Atlantic may have similar claims for tax years 1987 through 1990. While those claims may be affected by the disposition of this action, those claims are not presently before this court.

During the trial, the court received into evidence a 256-paragraph stipulation of facts, over 400 exhibits, and heard testimony from a number of fact and expert witnesses. The parties filed post-trial proposed findings of fact and post-trial briefs. Both parties were represented by skilled, knowledgeable and professional advocates who zealously represented their respective interests. For the reasons set forth below, the court finds that Bell Atlantic has not met its burden under the statute of proving that the property was "readily identifiable with" and "necessary to carry out" the alleged contracts, and it will enter judgment in favor of the United States.[3]

I. BACKGROUND

A. Factual Background

Before January 1, 1984, American Telephone & Telegraph Company ("AT&T") provided nationwide telecommunication services. Those services included the provision of local and long distance telecommunication services and the development, manufacture and sale of telecommunications equipment. (Stip. ¶ 2.) Bell Atlantic provided local telephone service as an AT&T subsidiary. (Stip. ¶ 1.)

In 1974, the Antitrust Division of the United States Department of Justice (the "DOJ") brought a civil antitrust suit

[3] The parties presented the court with a detailed stipulation of facts which is used by the court wherever possible.

against AT&T in the United States District Court for the District of Columbia alleging anti-competitive conduct by AT&T. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982). In 1982, the DOJ and AT&T agreed to settle the litigation on the basis of a consent decree. (Stip. ¶ 4.) On August 24, 1982, the district court approved a modified version of the consent decree, and entered it as the modified final judgment ("MFJ") in the case. (Stip. ¶ 5; BA Ex. 63.)

Under the MFJ, AT&T was permitted to continue to offer and provide long distance or "interexchange" services, but was required to divest itself of local or "intraexchange" services.[4] (Stip. ¶ 5; Pl.'s Ex. 63.) Pursuant to the MFJ, AT&T filed a Plan of Reorganization and the local carriers filed plans implementing "Equal Access."[5] Bell Atlantic formed the seven subsidiaries to provide local telecommunications services in Delaware, the District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia and West Virginia. (Stip. ¶¶ 8-9, 11.) Shortly thereafter, Bell Atlantic began providing local telecommunication service in its particular regions. Other local carriers also began providing services in their respective

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[4] For clarity and simplicity, the court will use the more colloquial terms "long distance" and "local" to refer to these services.

[5] Pursuant to the Consent Decree and the MFJ, Bell Atlantic and other local carriers are required to provide all long distance carriers with access to their exchanges, information, and services that is "equal in type, quality, and price to that provided to AT&T and its affiliates." (the "Equal Access" requirement). (Stip. ¶¶ 12-13.)

regions throughout the remainder of the United States. AT&T and a few other companies began providing long distance services to the local telecommunication companies' customers.[6]

B. Statutory Background

Before 1986, as an investment incentive, the Internal Revenue Code (the "Code") provided that qualifying businesses were entitled to an investment tax credit for certain types of tangible personal property placed in service during the tax year. Illinois Cereal Mills, Inc. v. C.I.R., 789 F.2d 1234, 1236 (7th Cir. 1986) (interpreting 26 U.S.C. § 38). The amount of the credit was based upon a formula set forth in the Code at 26 U.S.C. § 46(c). In this case, the applicable credit would be ten percent of the value of eligible property placed into service during the relevant tax year. 26 U.S.C. § 46.

In 1986, Congress enacted the Tax Reform Act of 1986, which lowered the top marginal income tax rates for individuals and corporations. Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2166 (The "Act"). The Act also eliminated a number of deductions and credits, including the ITC for property placed in service after December 31, 1985. 26 U.S.C. § 49(a). However, the Act contained several transitional rules to provide relief to taxpayers who had relied upon the ITC when entering contracts

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[6] There have been a number of changes in telephony law in recent years. The court concerns itself only with the laws relevant to the disposition of this case. Therefore, the laws discussed herein are not necessarily the same as those that govern present service.

that required the purchase of tangible personal property after the date of the ITC's repeal. If a taxpayer qualified under one of the transitional rules, it could continue to claim the credit on certain property placed in service after December 31, 1985 (the "transition property").[7] 26 U.S.C. § 49(b)(1).

Two of the transitional rules are relevant to this action, the "binding purchase contract rule" and the "supply or service contract rule." The "binding purchase contract rule" applies where the relevant contract is between the taxpayer and the vendor of the property. Tax Reform Act of 1986 § 203(b)(1)(A). Under that rule, the repeal does not apply to any property that is "constructed, reconstructed, or acquired by the taxpayer pursuant to a written contract which was binding on December 31, 1985." Bell Atlantic's original tax refund request, which was refunded and is no longer at issue, was premised upon rule.

The "supply or service contract rule" applies where there is a binding written contract between the taxpayer and a person other than the vendor of the property. Tax Reform Act of 1986 § 204(a)(3). The "supply or service contract rule" permits the taxpayer to claim an ITC for any transition property that is "readily identifiable with and necessary to carry out a written supply or service contract, or agreement to lease, which was

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[7] The Code defines transition property as "any property placed into service after December 31, 1985 and to which the amendments made by section 201 of the Tax Reform Act of 1986 do not apply . . ." 26 U.S.C. § 49(e).

binding on [December 31, 1985]." Tax Reform Act of 1986 § 204(a)(3). Bell Atlantic's claim presently before the court is premised upon this rule.

As a corporation, Bell Atlantic files tax returns with the Internal Revenue Service. On its consolidated income tax return for the taxable year 1986, Bell Atlantic claimed an ITC in the amount of $114,210,925.00, based on the "binding purchase contract rule." (Stip. ¶ 14; Ex. 3.) That amount was refunded. On September 1, 1987, Bell Atlantic filed a claim for an additional refund in the amount of $83,500,000.00 pursuant to the ITC "supply or service contract rule." (Stip. ¶ 15; Ex. 21.) The IRS denied that claim, and on December 27, 1996, Bell Atlantic filed this civil action. In the course of preparing for trial, both parties made concessions and Bell Atlantic reduced the amount of its claim for refund to $77,476,303.00. (Stip. ¶¶ 16, 188.)

II. STANDARD

This case presents an issue of statutory construction. When resolving a dispute over the meaning of a statute, the court looks to the statute itself to determine whether the statute is plain and unambiguous with regard to the dispute. United States v. Ron-Pair Enters., Inc., 489 U.S. 235, 241 (1989). If the statutory language is unambiguous and consistent, the inquiry must cease, and the court may not look beyond the statute to extrinsic materials. Robinson v. Shell Oil Co., 519 U.S. 337,

340 (1997). In making this determination, the court looks to the language, the context in which the language is used and the broader context of the statute as a whole. Id. The court may also look to legislative history for illumination. Paskel v. Heckler, 768 F.2d 540 (3d Cir. 1985). Generally, transitional rules offering tax credits are to be construed strictly in accordance with congressional intent. Helvering v. Northwest Steel Mills, 311 U.S. 46, 49 (1940). A taxpayer seeking a refund bears the burden of showing that it meets the conditions required to receive the credit sought. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Keasby & Mattison Co. v. Rothensies, 133 F.2d 894, 898 (3d Cir. 1940).

III. DISCUSSION

The question before the court is whether Bell Atlantic's alleged contracts meet the statutory definition for the "supply or service contract rule." If, as Bell Atlantic contends, the alleged contracts meet the definition, Bell Atlantic is entitled to the refund claimed or a portion thereof. Conversely, if, as the United States contends, the contracts do not meet the definition, Bell Atlantic is not entitled to the refund.

Bell Atlantic contends that its business as the principal local telephone company in the Mid-Atlantic region "required it to maintain a wide variety of commercial relations that, in turn, were reflected in and governed by binding written contract arrangements with other parties." (BA Pretrial Mem. at 4.) Bell

Atlantic also contends that its obligations under these contracts required it to place the claimed property into service in 1986, and that Bell Atlantic is therefore entitled to the ITC.

Bell Atlantic has categorized the contracts it believes result from these relationships as: franchise agreements, tariffs, contracts with other local telephone companies and contracts with long distance carriers. (BA Pretrial Mem. at 5; BA Post-trial Mem. at 5.)[8] The United States disagrees with Bell Atlantic's characterization of the foregoing as "binding written contracts," and further contends that the property claimed is not "readily identifiable with and necessary to carry out" Bell Atlantic's alleged contracts.

To prevail, Bell Atlantic must show that it was a party to multiple written supply or service contracts that were binding on December 31, 1985 and that the property for which the ITC is claimed was tangible personal property that is readily identifiable with and necessary to carry out those contracts. The court now will address each relevant part of the statute.

A. Tangible Personal Property

Because a basic understanding of the property involved is necessary to understand Bell Atlantic's argument, the court will briefly address the property first.

The wireline telephone network consists of two principal

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[8] Bell Atlantic also addressed customer specific contracts in its filings. However, those contracts were addressed in the parties' concessions and are no longer before the court.

categories of relevant property: (1) central office equipment ("COE") and (2) outside plant equipment ("OSP"). Telephone systems are an aggregation of small geographic areas, or "wire centers," each of which is serviced by one or more central offices. Central offices control the flow of calls within a wire center, and consist of switching equipment and interconnection facilities. This equipment makes up the COE category. (BA Pretrial Mem. at 19.) The principal piece of COE property is the telephone switch, which provides the connection that allows a call to be routed. In the most basic call, the switch connects the incoming line to the appropriate outgoing line, so that the call goes through. (BA Pretrial Mem. at 19.) In general, COE provides connections between any number of end users and between end users and long distance carriers. In order to complete these calls, there must be actual physical connections. Telephone poles, wires, cables and supporting equipment--the OSP--make these connections possible. (BA Pretrial Mem. at 19.)

Bell Atlantic contends that its constant purchases[9] of OSP and COE were necessary to its contracts because they were to "maintain, expand, and improve their telephone networks in order to meet the quality standards in their contractual obligations to

[9] Bell Atlantic categorizes these purchases as: growth, replacement and modernization. Growth purchases were necessitated by increasing volume and entailed expanding the capacity and capability of the system; replacement was necessitated by broken equipment and required replacement with up-to-date equipment; and modernization was necessitated by the need to provide economical service. (BA Pretrial at 20.)

provide telephone service." (BA Pretrial Mem. at 20-21.) Bell Atlantic contends that the purchases were readily identifiable to the contracts by reference to related documents, namely Bell Atlantic's internal documents.

B. The Contracts

A contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981); Black's Law Dictionary 6th ed. at 322.[10] A contract is binding under the "supply or service contract rule" only if it is written and enforceable under state law against the taxpayer and does not limit damages to a specified amount. Tax Reform Act of 1986 Section 204(a)(3). A contract is binding even if it is subject to a condition, as long as the condition is not within the control of either party or a predecessor. Tax Reform Act of 1986 Section 204(a)(3).

For ITC purposes, a contract that was binding on December 31, 1985 will not be considered binding at all times thereafter if it was substantially modified after that date. (H.R. Confr Rept. No. 99-841 at II-55 (Sept. 22, 1986)). Under the rule, the "specifications and amount of the property [must be] readily ascertainable from the terms of the contract or related

[10] The law of each of the jurisdictions in which Bell Atlantic conducts business is consistent with the Restatement definition.

documents." Tax Reform Act of 1986 Section 204(a)(3). Thus, the relevant contract terms may be found in a number of "related" documents. 132 Cong. Rec. S13867, 13953 (daily ed. Sept. 27, 1976). The court will address each of the categories of "contracts" Bell Atlantic has identified.

1. Franchises[11]

Regulatory franchises are voluntary arrangements between a regulating authority and a utility that have three characteristic components: rate regulation, utility service obligations and some form of entry control. (BA Pretrial Mem. at 7.)

Bell Atlantic was a party to three types of franchise agreements: at the federal level (governed by the FCC), at the state level (governed by the state Public Utility Commissions ("PUC")) and, in some cases, at the local level. (BA Post-Trial Mem. at 6; Exs. 71-72, 74.) In each jurisdiction, telephone companies operate pursuant to a complex regulatory scheme that is set forth in statutes, regulations, orders, customs and practice.

Each state's laws provide that telephone companies are regulated public utilities and delegates enforcement of the

[11] Bell Atlantic admits that there is overlap in its estimates and acknowledges that some of the projects that satisfy a franchise obligation also satisfy one or more projects with other telephone companies and that all projects required by contracts with other telephone companies were also required to satisfy franchise and tariff obligations. (BA Prop. Find. ¶ 147-148.) The court's determination renders a closer look at this overlap unnecessary.

regulatory schemes to PUCs. In order to enforce these schemes, the PUCs issue orders, promulgate regulations and review tariffs and rate changes. Generally, the companies were required to provide service in a non-discriminatory manner that complied with certain price and quality standards. (BA Pretrial Mem. at 7.)

Bell Atlantic argues that these franchises and related documents, including utility statutes, regulations, and in some cases certificates of public convenience and necessity, constitute written binding contracts that satisfy the requirements of the "supply or service contract rule."[12] (BA Pretrial Mem. at 7; Post-Trial Mem. at 7, 19; Exs. 146-47.) Bell Atlantic maintains that it was a party to written franchise agreements binding on December 31, 1985 in each of the jurisdictions in which it operated.[13]

Pursuant to the franchise process, each regulating authority granted Bell Atlantic the right to provide telephone service in a particular territory and Bell Atlantic agreed to comply with certain standards and provisions. (BA Pretrial Mem. at 8.) Bell Atlantic contends that these franchises were binding because they were enforceable under state law and there was no relevant limit

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[12] In 1985, Delaware, New Jersey, Pennsylvania, Virginia and West Virginia had traditional public utility statutes that provided for the issuance of certificates of public convenience and necessity. New Jersey and Virginia had an additional layer of local franchises. Maryland and the District of Columbia legislation did not provide for certificates of public convenience and necessity. (BA Pretrial Mem. at 7 n.14.)

[13] Bell Atlantic provided the court with copies of relevant franchise agreements. See, e.g., BA Ex. 72.

on the damages Bell Atlantic would have to pay if they failed to comply with their obligations. (BA Pretrial Mem. at 8.) None of the franchises were modified at any time during 1986.

At trial, Bell Atlantic presented expert testimony from Gregory Sidak and relied upon his book, J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and the Regulatory Contract (1991). According to Sidak, valid municipal franchises are enforceable contracts. (Sidak & Spulber at 161, 164.) Aside from Sidak's opinion, Bell Atlantic contends that each of the relevant states has also concluded that utility franchises are contracts enforceable under state law. (BA Pretrial Mem. at 10; Tr. II 44-112.) Bell Atlantic also relies on legislative history, arguing that Congress understood that franchises are contracts and intended them to be eligible under the transitional rules. Specifically, Bell Atlantic relies heavily on Senator Packwood's statement that cable television franchise agreements should treated as service contracts for purposes of Section 202(d)(3) "even though the franchise terms may be embodied in whole or in part in a municipal ordinance or similar enactment." 132 Cong. Rec. S8216, 8252 (daily ed. June 24, 1986); BA Pretrial Mem. at 11-12; Conf. Rept. at II-60.

The United States contends that, as a rule, state statutes and regulations are not contracts unless there is a clear indication to the contrary, and that in this case there is no such indication. National R.R. Passenger Corp. v. Aitcheson, 470 U.S. 451 (1985); Parker v. Wakelin, 937 F. Supp. 46, 52 (D. Me.

1996). The United States maintains that because the "contracts" do not set forth any specific supply or service obligations requiring Bell Atlantic to acquire property, the property is not readily identifiable and necessary, and Bell Atlantic can not satisfy the rule. (US Pretrial Mem. at 8.) The court agrees.

First, the court does not find that the franchises are contracts. However, even accepting arguendo that Bell Atlantic's franchises are contracts under the ordinary definition of that term, the franchise agreements do not constitute the types of supply or service contracts that the court believes Congress contemplated would qualify under this transitional rule. Bell Atlantic's customer agreements are often not written. The franchise obligations are entirely voluntary -- the agreement is terminable at will by the customer and Bell Atlantic, from the beginning, need not provide services. However, if Bell Atlantic does choose to provide services, it must comply with the promulgated rules. The tariffs do not require Bell Atlantic to provide any services or install any property. The documents, individually and collectively, simply require Bell Atlantic to satisfy certain general standards.

Further, cable television providers are not regulated in the same manner as other utilities and Congress specifically chose to deal with them separately. See 47 U.S.C. § 541. Therefore, the court finds that Bell Atlantic's reliance on Senator Packwood's statements regarding cable franchises is misplaced in this case concerning telephone service franchises because of their

fundamental differences in creation and administration.

Moreover, the property claimed is not "readily identifiable with and necessary to carry out" these alleged contracts. Tax Reform Act of 1986 § 204(a)(3). Neither the franchises nor the related documents identify the property to the “contracts” or show that it is necessary. For example, the C&P Virginia standards provide that "central office equipment shall be engineered so that customers shall receive the dial tone during the busy hour within three seconds after lifting their receivers on 98.5% of their calls." (BA Ex. 144 § 56-479.) The same standards also provide that telephone companies "should strive to install, use and maintain the most modern equipment." (BA Ex. 144 § 56-479.) Similarly, the Pennsylvania statute requires the phone companies to "furnish and maintain adequate, efficient, safe and reasonable service and facilities" and requires reasonably continuous service without unreasonable interruption or delay. (Stip ¶¶ 67-69; 66 Pa. C.S.A. §§ 1501-1503.) Most of the franchises or related documents required service to be completed promptly. For example, the New Jersey tariffs required "75% of regular service installations shall be completed within 5 working days, unless a later date is requested by the applicant." (BA Post-Trial Mem. at 7; Stip. 54, 55; Pl.'s Ex. 72; Prop. Find. 24, 25.)

Bell Atlantic urges the court to find that the property at issue was readily identifiable with and its purchase was necessary to the provision of the required "quality" service

under these agreements. Under Bell Atlantic's expansive reading, any upgrade to provide "quality service" was "necessary to the contract." The plain meaning of the statute does not permit this reading. The court cannot find that Congress, under this statute, intended to permit every utility to claim the ITC for such a large amount of its otherwise routine business expenditures. If Congress did intend the statute to be read as Bell Atlantic urges, the exception would wash away the rule, a result that is wholly inconsistent with the purpose of the statute.

2. Tariffs

A tariff is "a public document setting forth services of a common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services." Black's Law Dict. 6th ed. (1990) at 1456-57. Whereas the franchises allowed Bell Atlantic to provide telephone service within defined geographic areas, the tariffs governed the actual provision of services under the franchise agreements.

Tariffs set forth a description of the services that a particular regulated public utility provides, including the prices that customers may be charged for those services. Tariffs are reviewed and may be challenged by the regulating authority and consumers. Once effective, tariffs bind the customer and the utility to the tariffs terms. The Bell Atlantic tariffs in each of the relevant jurisdictions contain similar language. (BA

Pretrial Mem. at 13.)[14] Bell Atlantic argues that the tariffs represent binding written contracts, and that pursuant to these contracts Bell Atlantic was required to purchase the property for which it has claimed the ITC. The court again disagrees.

The tariffs contain broad language relating to quality standards. For example, the FCC tariff requires each Bell Atlantic OTC to:

> administer its network to insure the provision of acceptable service levels to all telecommunications users of its network services. Generally, service levels are considered acceptable only when both end users and customers are able to establish connection with little or no delay encountered within the telephone company network.

(BA Ex. 62 at 045583.) Similarly, the state tariffs required Bell Atlantic to administer its network to ensure the provision of "acceptable service." See BA Exs. 244, 247, 249, 251, 253, 255; BA Post-Trial Mem. at 6.

First, the court does not find that the tariffs are contracts under the normal definition of that term. However, even accepting arguendo that the tariffs are contracts, the court finds that these tariffs are not the type of contracts Congress contemplated under the ITC. The tariffs are descriptions of services offered and prices to be charged. They are terminable at will by the customers and Bell Atlantic can modify them by

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[14] For example, the Maryland tariff provides that upon the acceptance of an application for service, all the applicable provisions in Telephone Company's tariff lawfully on file become the contract between the customer and the Telephone Company. General Regulation Tariff P.S.C. Md. No. 201, Page 1b, Issued October 14, 1983.

filing a new tariff. The regulating authorities can revoke the certifications and levy fines. The tariffs are merely the rules with which Bell Atlantic must conform if it chooses to conduct business in the particular jurisdiction. Indeed, Bell Atlantic may decide that it does not agree with the terms and may decide not apply to provide its service in a particular jurisdiction. It would not be bound to do so. None of the tariffs require the purchase of property. None of the tariffs or related documents alone or together identify the property to the "contracts" or necessitate the purchase of the property. The court finds that the property for which Bell Atlantic claims the ITC was not "readily identifiable with and necessary to carry out" these "contracts."

3. Contracts With Other Telephone Companies

In the mid-1980's, Bell Atlantic was one of a number of local carriers providing service in the Mid-Atlantic region. To provide uninterrupted service to customers, the companies had to cooperate and coordinate their services. (BA Pretrial Mem. at 14; BA Post-trial Mem. at 23.) As a result, Bell Atlantic contends that it was a party to numerous written service contracts with other local telephone companies that necessitated the purchase of the property for which it is claiming the ITC. Similar to the other "contracts" discussed thus far, these agreements typically required Bell Atlantic to maintain its networks within the industry standards. (BA Prop. Find. at 25; BA Exs. 17-23; 25; 46-61.)

For example, C&P-Va's standard agreement, which is representative of the other agreements, required C&P Va to "construct, equip, maintain and operate its systems so as to provide adequate facilities for the provision of service to the public and to the other party at all times." (BA Prop. Find. at 26, ¶ 77.) The court does not disagree with Bell Atlantic's contention that it was a party to contracts with these other telephone companies. However, the property claimed is not "readily identifiable and necessary to carry out" those contracts.[15] Neither the agreements nor the related documents sufficiently identify the property to the contracts or show that the property is necessary to the contracts.

4. Interexchange Access/Long Distance Contracts

Long distance calls are carried by long distance carriers such as AT&T, MCI and Sprint rather than local telephone carriers such as Bell Atlantic. Long distance carriers do not connect directly to customers, they must access their customers through the local telephone companies. Thus, successful completion of a long distance call requires cooperation between long distance and local carriers. (BA Exs. 68, 375.)

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[15] The court notes that a number of the agreements presented were not signed by the parties until after December 31, 1985, the date on which the agreement was required to be binding under the statute. The court also notes the United States' argument that, even if Bell Atlantic's argument were successful, the same property claimed under this category would have been necessary to provide the quality service required to Bell Atlantic's <u>own</u> customers and should not be counted more than once in any calculation.

Bell Atlantic contends that the Equal Access requirement and related documents, including the tariffs, constitute binding written contracts under the statute. (BA Post-Trial Mem. at 20-21.) The MFJ required each local telephone company to provide Equal Access to long distance carriers. The Equal Access Plans were embodied in the FCC tariffs. Bell Atlantic argues that these obligations required it to augment and maintain its networks by purchasing the property in question. (BA Pretrial Mem. at 17.) Once again, the court does not find that Bell Atlantic has shown that these documents identified or required the purchase of the property for which Bell Atlantic has claimed the ITC.

Bell Atlantic also contends that its internal corporate documents, including routine budget projections, field reports and summaries provide a link between the contracts and the property. Specifically, these documents identify the property with the contracts and further show that the property is necessary to the contracts.[16]

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[16] To substantiate its claim for refund, Bell Atlantic produced estimate files for projects it claims had property placed in service during 1986. (Stip. ¶ 181.) For each construction project undertaken by a Bell Atlantic OTC during 1986 that was estimated to cost more than a threshold amount of approximately $25,000.00, an estimate file was established. Each file includes a description of the project, an explanation of the need for the project, a description of the equipment required, the anticipated cost and the authorization. (BA Prop. Find. at 36; ¶ 101.) Bell Atlantic maintains that per the contract requirements, it had to "routinely replace a certain portion of its tangible personal property each year, such as telephone poles, wires, small electronic parts, etc." Bell Atlantic prepared bulk estimate files for those projects which generally

C. Identifiability and Necessity

It is this part of the statute that the court finds fatal to Bell Atlantic's case. Even if the court were to find that Bell Atlantic had proven each of the alleged arrangements it had to provide service was a contract, the "specifications and amount of the property are [not] readily ascertainable from the terms of any of those contracts, or from related documents." Conf. Rept. at II-60. Thus, the property is not "readily identifiable with and necessary to carry out" the alleged contracts, and the claims fail.

Bell Atlantic contends that it has satisfied the statute as follows. The franchises and tariffs specify the services and the franchises specify the quality of the service. (BA Pretrial Mem. at 25.) As for contracts with other telephone companies, the documents specify that each party must construct, equip, maintain and operate its telephone system to meet industry accepted standards. (BA Pretrial Mem. at 25.) According to Bell Atlantic's argument, fulfillment of these standards necessitated the purchase of the property. Bell Atlantic's internal budget and project estimates, including reports generated specifically for this litigation, are "related documents" that identify the property to be placed in service and further show why the

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cost less than the threshold amount. (BA Prop. Find. at 36; ¶ 102; Pl.'s Exs. 342-404.) Bell Atlantic concedes that the claim includes $328,241,175.00 for which no estimate files can be found. (BA Prop. Find. ¶ 150; Stip. ¶¶ 184-185.) Because the court enters judgment in favor of the United States, it will not address this issue.

property was necessary.[17]

The court does not find that Bell Atlantic has satisfied this prong. The proffered related documents were generated for internal forecasting rather than for the alleged contracts. The internal documents were not related to the contracts or prepared contemporaneously with the contracts in many cases. Moreover, these documents were not provided to the other contracting parties and do not evidence a commitment; they are merely internal business management tools rather than related to the formation or execution of a particular contract. These documents, the only ones offered to show the required "specifications and amount of the property" are not within the realm of “related documents” permitted to be relied upon in deciding the issues in this case.

The court cannot find that Congress, in writing the "supply or service contract rule," intended to permit an integral part of the contract and related documents (that part describing the specifications and the amount of property) to be anything more than a unilateral internal document created and subject to being altered at will by the taxpayer for presumably proper purposes unto itself, but having little or no binding or other affect on the other party to the contract. The court cannot find in this case that the property is identifiable with or necessary to the

[17] Bell Atlantic breaks this down into categories: growth, replacement, modernization and special projects. (BA Post-Trial at 40-41.)

alleged contracts. The plain meaning of the word necessary is "essential . . . having the characteristic of something that is logically required or logically inevitable . . . absolutely required." Webster's Third New Int'l Dict. at 1510. Under the plain meaning of that term, Bell Atlantic's claimed property does not qualify as a ground for relief under the statute. The property claimed has not been shown to be "essential" to any of Bell Atlantic's proffered "contracts."

Simply put, the link between the property for which Bell Atlantic is claiming the ITC and the alleged contracts is too attenuated. The court agrees with the United States District Court for the Southern District of Illinois, which found:

> to allow supply contracts to implicitly require the acquisition of property means that the transition rule exception would swallow the rule eliminating the ITC. . . . In order to be eligible for the ITC, the property must have been specifically described.

United States v. Zeigler Coal, 934 F. Supp. 292, 295 (S.D. Ill. 1996). This court finds that Bell Atlantic's claimed property was not shown to be readily identifiable with or necessary to the contracts Bell Atlantic has proposed.

IV. CONCLUSION

The evidence produced at trial showed that Bell Atlantic was required to provide quality service whenever it was permitted to operate. The evidence did not show that this general, albeit important, obligation worked to allow the property for which Bell

Atlantic claimed the ITC is "readily identifiable with and necessary to carry out" contracts that were binding on December 31, 1985. The plain meaning of the “supply or service contract rule” does not permit an interpretation that would allow Bell Atlantic to prevail on the evidence presented. The court finds that Bell Atlantic has not met its burden of proof and will therefore enter judgment in favor of the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BELL ATLANTIC	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	**No. 96-8657**

ORDER

AND NOW, TO WIT, this day of November, 1998, IT IS ORDERED that Judgment is entered in favor of the United States of America and against Bell Atlantic Corporation.

LOUIS C. BECHTLE, J.